IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1059 OF 2006

BETWEEN:

HARRIET MOYO……..……..PLAINTIFF

- and -

JHANGO PUBLISHERS……DEFENDANT

CORAM: CHIMASULA PHIRI J.

Kasambara of Counsel for the plaintiff

Kauka of Counsel for the defendant

N. Nyirenda – official interpreter.

RULING

Chimasula Phiri J,

This is the defendant's application for an order to vacate the ex-parte interlocutory injunction order which the plaintiff obtained on 19th April 2006. The order restrained the

defendant from developing plot number SW8/597/22/1, Chitawira Light Industrial site allegedly belonging to the plaintiff until a further order or until determination of the substantive action.

The substantive action was filed in June 2006. The action has faced its own technical hurdles and has not reached trial stage as yet.

In July 2006, the defendant took out the current application seeking an order that the interlocutory injunction order be vacated on the grounds that it was erroneously granted. The errors relied upon by the defendant are set out as follows:-

(i) there was delay and acquiescence on the part of the plaintiff in bringing both the action and applying for the injunction order;

(ii) there was non-disclosure of material facts;

(iii) the plaintiff does not have clean hands;

(iv) in the event of success, damages would be an adequate remedy.

The application is supported by an affidavit of Dr James Lapani Ng'ombe, the defendant's Managing Director. In substance he swears that the plaintiff became aware that the defendant was constructing on the portion of the land to which she is now claiming ownership no later than 19th October 2004. The plaintiff took no action on her alleged ownership claim until 2006. Of course during this period the defendant continued with development activities on the disputed land. Dr Ng'ombe stated that after the plaintiff had transferred the lease to the defendant of Title Soche East CW1/40 she managed to obtain approval from the Regional Commissioner of Lands and not Malawi Housing Corporation to subdivide the very same land which she had already transferred to the defendant. It is contended that he plaintiff never disclosed that at the time she made the application for subdivision she had already transferred her interest in the land to the defendant.

Finally, Dr Ng'ombe has deponed that as construction is virtually complete and damages, if any, would be an adequate remedy and that the balance of convenience tilts in favour of the defendant.

The plaintiff opposes this application. In her Affidavit in Opposition she states that she is the registered owner of leasehold property known as plot number SW8/597/22 and SW8597/23. In October 2002 the plaintiff sold to the defendant plot number SW8/597/22. She contends that at the time of sale she was already the owner of plot number SW8/597/22/1. She has exhibited a letter to show that she was responsible for payment of city rates. In October 2004, she noticed that the defendant had encroached on her property. She wrote and complained about that encroachment. The defendant continued to ignore such complaints. The plaintiff denies that plot number SW8/597/22 was subdivided resulting into SW8/597/22/1. The plaintiff further complains that even when the interlocutory injunction order was served on the defendant, the defendant continued with construction works. It is the plaintiff's contention that the defendant is essentially not denying trespass to the plaintiff's land. She prays for dismissal of the defendant's application.

The defendant through its counsel filed and served an Affidavit in Reply. In that affidavit Mr Kauka has stated that he had discussions with his then counter-part, Mr Chifundo Ngwira and that both counsel were in agreement that the plaintiff had not furnished the defendant with proof of title and that construction was virtually complete. The Affidavit in Reply ended in a position that former counsel of the plaintiff reneged from that aforementioned agreement. The indication by the defendant is that it has since stopped further construction works.

The court is most grateful to both counsel for the their written skeleton arguments. The defendant's thrust argument is that the injunction order ought not to have been granted in the first instance – on the ground of acquiescence and delay. There are several cases cited to show that such application ought to be made promptly. Furthermore, with the delay which the plaintiff displayed, she should not have been allowed to come *ex parte* and that *ex parte* injunctions are for cases of real urgency, where there has been a true impossibility of giving notice of motion – *vide*- **Bates v Lord Hailsham of St Marylebone** [1972] 1 WLR 1373.

The plaintiff has contended that delay to present an action does not always operate to prevent a party from obtaining relief. The court must look at the circumstances of the case and establish the reasons for the delay. In the present case, the plaintiff did not just sit back and watch the defendant interfere with her alleged land rights. It is shown that there were attempts to settle out of court and challenging the alleged trespass through letters.

I accept the defendant's argument that there was inordinate delay in bringing the summons for interlocutory injunction. However, the plaintiff has given plausible explanation for the delay and it would be unfair for this court to set aside the order merely for reason of delay. This is a question of fact and each case must be decided on its own peculiar facts. The court cannot prescribe universal yardstick of delay. I am also impressed with the defendant's argument that where there is delay the plaintiff should not come to court *ex parte*. This would be a matter of good practice. However, I would not prescribe it because whether or not a party rushes to court *ex parte* may at times depend on the heat and vulnerability perceived by that party and any delay through *inter partes* summons may appear dilatory. The court should be able to evaluate and assess the situation and determine if it was necessary to allow a party to be heard *ex parte.* Continued construction by the defendant on what the plaintiff claimed to be her land threatened her time for relief hence her *ex parte* summons.

The defendant has argued that the plaintiff did not disclose material facts and that her hands are dirty. The defendant alleges that the plaintiff was asked to produce title for this parcel but no such title was produced to the defendant. The submission is that in all *ex parte* motions there must be full disclosure of material facts within the knowledge of the applicant. As per Tembo J, as he then was, ruling in **G. R. Naura v CBM Financial Services** Civil Cause Number 2853 of 1997 (unreported) the court is mandated to discharge an injunction where the court holds the view that an order previously made was so made in circumstances where there was suppression of material facts.

The plaintiff denies any suppression of material facts. She argues that in her *ex parte*, she was asserting to the court that she has title over the land and disclosing her interest in the land. She claims that she has title.

The views of this court are that in interlocutory injunction motions, it must be appreciated that the essence of such motions is to preserve status quo of the parties and that the court should refrain from deciding the substantive matters merely on the affidavits. Despite the plaintiff not producing title document, there is *prima facie* evidence of the same based on the city rates payment demand. This is an issue which calls for a full trial to determine the rights of the plaintiff and the defendant. It is not necessary for this court or the earlier court to determine issue of ownership in an interlocutory motion.

The defendant submitted that balance of convenience favoured the defendant because the building is virtually completed and that the defendant has the means to pay damages. The plaintiff contends that damages may not always be adequate remedy for trespass i.e. a permanent injunction may also be ordered.

This court is of the view that continued application of the interlocutory injunction is desirable. The parties should endeavour to conclude the trial or settle out of court. The matter does not appear to be beyond capacity of the parties to compromise. If the matter is not settled through negotiations, it must be listed for trial before March 2007.

I order that each party shall meet own costs for this summons.

MADE in chambers this 26th day of September 2006.

Chimasula Phiri

JUDGE